



**VAN DERMYDEN MAKUS**  
*Investigations Law Firm*

TCCS Policy Training | Investigator  
*For The Claremont Colleges Services*

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“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”

— Title IX

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**New DOE Regulations**

- On August 14, 2020, new regulations (“the Final Rule”) went into effect
- Applicable to conduct occurring on/after August 14, 2020
- Changed some things and codified others
- Does not prohibit schools from addressing behavior outside of Title IX

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**Role of the Investigator**

- To gather evidence through:
  - Interviews
  - Document gathering and review
  - The Evidence Review Process
- To write an Investigation Report
- To provide testimony at Hearing, if requested
- To be familiar with the definitions contained within Policy, including the definition of Sexual Harassment
- NOT to make factual or policy findings
- NOT to make credibility determinations

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**Grievance Process Overview**

- Initiation of the Title IX Grievance Process
  - Formal Complaint and Intake process
- Investigation
  - Including Evidence Review Process
- Hearing
- Sanctioning (if applicable)
- Appeal
- Final Sanctioning Determination (if applicable)

*Parties also have the option of resolving the complaint through the Alternative Resolution Process*

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**Decision to proceed or not proceed under Policy**

- The Institution is required to consistently evaluate if the Policy is still applicable
  - If information is discovered that the complaint no longer meets the requirements to proceed under the Policy, the school must terminate the proceedings under the Policy.
  - The school can still pursue the conduct under another policy

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**Policy Jurisdiction Requirements**

- Definition: the conduct alleged in the Formal Complaint could constitute Sexual Harassment, as defined by the Policy.
- Location:
  - Conduct occurred in an educational program or activity controlled by TCC
  - Conduct occurred in the United States
- Complainant Status: Complainant is participating, or attempting to participate, in an education program or activity of TCC

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**Sexual Harassment**

Conduct on the **basis of sex** that satisfies one or more of the following:

- quid pro quo (employee Respondents only);
- unwelcome conduct; or
- specific defined acts.

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**Sexual Harassment: Quid Pro Quo**

- An employee of TCC conditioning the provision of:
  - An aid;
  - Benefit; or
  - Service of the Institution
- On an individual's participation in
- Unwelcome sexual conduct
  - A Complainant's statement that they found the conduct to be unwelcome is sufficient to constitute "unwelcome conduct"

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**Sexual Harassment: Unwelcome Conduct**

Unwelcome conduct on the **basis of sex** that a reasonable person would determine is so:


- Severe;
- Pervasive; **and**
- Objectively offensive,

That it effectively denies a person equal access to the Claremont College's Education Programs or Activities.

"Unwelcome conduct" depends on a variety of factors and must be evaluated in light of the known circumstances.

"Severe, pervasive, and objectively offensive" must be evaluated in light of the known circumstances, and is dependent on the facts in each situation. However, this element must be determined from the perspective of a reasonable person standing in the shoes of the Complainant.

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**Sexual Harassment: Specific Acts**

Conduct on the **basis of sex** that constitutes one or more of the following:

- **Sexual Assault**, as defined by Clery Act;
- **Dating Violence**, as defined by VAWA;
- **Domestic Violence**, as defined by VAWA; or
- **Stalking**, as defined by VAWA

*A single instance of any conduct listed above is sufficient to constitute Sexual Harassment. Any instance of any of the conduct listed above does not need to demonstrate severity, pervasiveness, objective offensiveness, or denial of equal access to education or employment, because denial of equal access is assumed.*

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**Sexual Harassment: Sexual Assault/Rape (Clery Act)**

Sexual Assault is an offense that meets the definition of **rape**, fondling, incest, or statutory rape.

**Rape:**

- The penetration, no matter how slight;
- Of the vagina or anus with any body part or object; or
- The oral penetration by a sex organ of another person;
- Without the consent of the Complainant.

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**Sexual Harassment: Sexual Assault/Fondling (Clery Act)**


Sexual Assault is an offense that meets the definition of rape, **fondling**, incest, or statutory rape.

**Fondling:**

- The touching;
- Of the private body parts of another person;
- For the purposes of sexual gratification;
- Without the consent of the Complainant.

This includes instances where the Complainant is incapable of giving consent because of age or permanent mental incapacity.

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**Sexual Harassment: Sexual Assault/Incest (Clery Act)**

Sexual Assault is an offense that meets the definition of rape, fondling, **incest**, or statutory rape.

**Incest:**

- Sexual intercourse;
- Between persons who are related to each other;
- Within the degrees wherein marriage is prohibited by law.

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**Sexual Harassment: Sexual Assault/Statutory Rape (Clery Act)**


Sexual Assault is an offense that meets the definition of rape, fondling, incest, or **statutory rape**.

**Statutory Rape:**

- Sexual intercourse;
- With a person who is under the statutory age of consent.

In California, the statutory age of consent is 18.

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### Sexual Harassment: Dating Violence (VAWA)

- Violence committed by a person;
- Who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - The length of the relationship;
  - The type of relationship; and
  - The frequency of interactions between the persons involved in the relationship.

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### Sexual Harassment: Domestic Violence (VAWA)

- Acts that include felony or misdemeanor crimes of violence committed by one of the following:
- A current or former spouse or intimate partner of the Complainant;
  - A person with whom the Complainant shares a child in common;
  - A person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - A person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the state of California; or
  - Any person whose acts as an adult or youth, Complainant is protected from, under the domestic or family violence laws of the state of California.

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### Sexual Harassment: Stalking (VAWA)

- Engaging in a course of conduct directed at a specific person;
- That would cause a reasonable person to:
  - Fear for their safety or the safety of others; or
  - Suffer substantial emotional distress.

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**Additional Definitions**

Please review the Policy carefully to understand the definitions of:

- Consent
- Incapacitation
- Violence

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**Also Prohibited: Retaliation**

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this Policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or Sexual Harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of Sexual Harassment, for the purpose of interfering with any right or privilege secured by Title IX or this Policy, constitutes Retaliation.

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**Location of the Conduct**

- Conduct must have occurred in an education program or activity controlled by TCC
  - This includes buildings or properties controlled by officially recognized student organizations
- Conduct must have occurred against a person in the United States

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**Scope of TCC’s Education Programs and Activities**

- “Education Program or Activity” refers to all the operations of TCC, including, but not limited to:
  - in-person and online educational instruction,
  - employment,
  - research activities,
  - extracurricular activities,
  - athletics,
  - residence life,
  - dining services,
  - performances, and
  - community engagement and outreach programs
- Applies to all activity that occurs on campus or on other property owned or occupied by TCC
- Also includes off-campus locations, events, or circumstances over which TCC exercises substantial control

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**Complainant Status**

- At the time of filing a Formal Complaint, the Complainant must either be:
  - Participating in an education program or activity of TCC; or
  - Attempting to participate in an education program or activity of TCC

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**Alternative Resolution Process**

- Entered into voluntarily by all parties
- Used in lieu of the Title IX Grievance Process
  - If school officials decide alternative resolution is not appropriate, the determination is not subject to appeal
- Can be mediation, restorative justice, or another option
- Will sometimes end up back in the Title IX Grievance Process
  - If due to a decision by school officials, the determination is not subject to appeal

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**Process Overview**

- Investigation begins after the Notice of Investigation has been sent
  - Involves collecting evidence and interviewing parties and witnesses
  - This builds the record of the case that is used in the hearing
- Hearing is scheduled once the final Investigation Report is submitted
  - The Adjudicator makes credibility determinations, findings of fact, and findings of policy
- Appeal Authority will look to both the Investigation Report and the Hearing Decision (among other important things) when making determinations

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**Conducting the Investigation**

- The Investigator should read the Notice Letters, Formal Complaint, and any other relevant materials before starting the investigation
- Both parties must be provided an equal opportunity to:
  - Meet with the investigator
  - Submit evidence
  - Identify relevant witnesses

Parties may be accompanied by an Advisor and/or Support Person during every meeting. Parties can choose anyone to serve as their Advisor. Parties still must answer the questions themselves. Advisors and Support Persons cannot disrupt the interview/meeting.

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**Conducting the Investigation: Interviewing**

- No person is required to participate in an investigative interview
  - Even if a party declines to be interviewed, they are still afforded the opportunity to submit evidence, suggest witnesses, and participate in the Evidence Review process
- Before interviewing the parties, the investigator must provide them written notice of:
  - The date, time, location, participants, and purpose of the meeting
  - The written notice must allow the party sufficient time to prepare
- After each interview, the investigator takes the following steps:
  - Prepares a written summary of the interview
  - Sends the written summary to the individual for a review of accuracy
  - Individuals have 2 business days to provide feedback. If none is provided, the summary is deemed accurate.

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**Relevance: Questions and Evidence**

- The Investigator will take reasonable steps to gather relevant evidence. The Investigator may exclude evidence they determine to be irrelevant or immaterial.
- If the Investigator determines proposed witnesses, documents, and/or questions are not relevant, they must document their analysis in their Investigation Report.

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**Prior Conduct – Relevant or Not?**

- Per Policy, Investigators may gather information about the **prior or subsequent conduct** of the Respondent for purposes of determining:
  - Pattern
  - Knowledge
  - Intent
  - Motive
  - Absence of mistake

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**Sexual Predisposition or Prior Sexual Behavior – Relevant or Not?**

Per Policy, the Investigator will **not** gather evidence (including asking questions) about a party’s “sexual predisposition or prior sexual behavior” **unless** the evidence:

- Is offered to prove someone other than Respondent committed the alleged conduct;
- Relates to specific instances of the parties’ prior sexual behavior with each other and are offered to prove or disprove consent;
- Is relevant to explain an injury; and/or,
- Is relevant to show a pattern of behavior

*This evidence may not be gathered to speak to a party’s reputation or character*

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**Evidence Review Process**

- The Investigator generates a Preliminary Investigation Report, summarizing the information gathered
  - The Preliminary Investigation Report should include relevant information that someone might rely upon in making factual and policy findings
  - Attachments should include all witness summaries and documents gathered over the course of the investigation
- The Administrator is responsible for distributing the Report to the parties for review

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**Evidence Review Continued**

- The parties may:
  - Submit proposed questions for the Investigator to ask of the other party and/or witnesses;
  - Request additional interviews;
  - Suggest additional witnesses;
  - Request additional information-gathering
- The Investigator will review these responses and determine if additional evidence-gathering is warranted.
  - These determinations must be explained in the final Investigation Report

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**Evidence Review Continued**

- If additional information is provided (including written responses from the parties), it will be included in a revised Preliminary Investigation Report or in an addendum
- Both parties must have reasonable opportunity to review and respond to any new evidence
- The Investigator determines when it is appropriate to conclude the Evidence Review Process. At that point, the Investigator generates their Final Investigation Report

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**Final Investigation Report**

- Identity of parties and witnesses;
- Dates of conducted interviews;
- Summary of the allegations;
- Policy alleged to be violated by the conduct;
- Summary of the investigation process;
- Relevant statements of parties and witnesses;
- Summary of relevant evidence gathered;
- Description of relevant, material disputed and undisputed facts;
- Description of how and when parties were given the opportunity to review evidence; and
- Explanations for why evidence or witnesses proposed by the parties were not considered.

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**Bias**

- Traditional biases:
  - Race, gender, sexual orientation, religion, etc.
- Confirmation bias:
  - A psychological phenomenon that explains how people tend to seek out information that:
    - Confirms their existing opinions, and
    - Overlooks or ignores information that refutes their beliefs
- M.A.T.E.
  - Monitor; Acknowledge; Trauma; Express

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**Maintaining Impartiality**

Serving impartially includes avoiding:

- **Prejudgment of the facts at issue**
- **Conflicts of interest**
- **Bias**

“The Department wishes to emphasize that parties should be treated with **equal dignity and respect** by Title IX personnel [...]”

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### Hearing Process

- An Adjudicator will oversee the hearing and make final factual and policy determinations
- Individuals who provided statements to the Investigator will be asked to provide testimony during the hearing
- Parties have the opportunity to directly question anyone who testifies through their Advisor
- After the hearing closes, the Adjudicator will make final factual and policy determinations and summarize those determinations in a written report.

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### Appeal Process

- Both parties have an opportunity to submit a written appeal
- An Appeal Authority is assigned to review the appeal and any response submitted by the other party
- The Appeal Authority issues a written decision
- The Appeal Decision is final and the process concludes

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### Appeal Grounds

- A party may appeal based on one or more of the following grounds:
  - **Procedural Error**
    - Procedural error(s) materially affected the outcome of the matter
  - **Conflict of Interest**
    - Appealing party must describe the alleged conflict of interest or bias held by the individual and how this altered/impacted the outcome
  - **New Evidence**
    - New evidence which was not available or known (and could not have reasonably been known) at the time of the final determination which materially affected the outcome of the process
  - **Disproportionate Sanctions**
    - Sanctions are disproportionate to the Adjudicator's findings

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**Resources**

- The TCC Title IX Sexual Harassment Policy
- The Title IX Coordinator(s) involved in the matter
- The Title IX Administrator

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